

BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF WASHINGTON

In the Matter of the Application
Regarding the Conversion and
Acquisition of Control of Premera
Blue Cross and its Affiliates.

University of Alaska, United Way of
Anchorage, Anchorage Neighborhood Health
Center, and John Garner, by his next friend,
Barbara Garner,

Applicant for Intervention.

Docket No. G02-45

ALASKA PETITIONERS'
SUPPLEMENTAL JOINT REPLY TO
OIC STAFF'S RESPONSE TO
REQUESTS FOR INTERVENTION AND
TO PREMERA'S OPPOSITION TO
MOTIONS TO INTERVENE

INTRODUCTION

COME NOW the University of Alaska, United Way of Anchorage, Anchorage Neighborhood Health Center, and John Garner ("Alaska Petitioners") and hereby file a joint reply to OIC Staff's Response to Requests for Intervention ("OIC Response") and Premera's Opposition to Motions to Intervene ("Opposition").¹

¹ Except for the purely Alaskan issues addressed herein, the Alaska Petitioners join in the Joint Reply to OIC Staff Response and Premera Opposition to Motions to Intervene

As OIC stated in its Response, OIC Response at 12, the Alaska petitioners have demonstrated a significant interest under the applicable statutes, RCW 48.31B.015(4)(b), 48.31C.030(4) and 34.05.443(1). These interests cannot be adequately addressed, however, by the proposed combining of the Washington and Alaska consumer petitioners as one group with one “attorney-in-charge” representing the combined group on all issues. While common representation on most issues may be permissible, even practical, such representation on issues particular to Alaska would be, as demonstrated below, manifestly in error.² Aggravating the OIC’s error is the fact that the Alaska petitioners have no other available forum in which their purely Alaskan concerns can be addressed. Therefore, as shown below, the Alaska petitioners should be allowed to intervene separately on those issues that are particular to Alaska, specifically: 1) the allocation of the assets between Washington and Alaska;³ and 2) the impact of the proposed conversion on the healthcare system in Alaska.⁴

(“Joint Reply”) that is being filed today for all petitioners for intervention. *See* Joint Reply.

² With respect to most issues before the Commissioner regarding the proposed conversion, the Alaska Petitioners do not object to acting together as a group with the Washington consumers group. Nor do they object to reasonable restrictions on discovery. *See* Alaska Legal Services Corporation letter to John Hamje, Staff Attorney, OIC, dated December 11, 2002 (stating that the United Way of Anchorage, Anchorage Neighborhood Health Center, and John Garner commit to closely collaborating with the Washington consumers group on all the common issues and further agree to appropriate discovery limitations).

³ This includes, but is not limited to, valuation issues and governance and structure of the proposed foundation shareholder and the Alaska charitable organization.

⁴ The Washington consumers petitioners have formally opposed the proposed conversion. *See* Joint Reply at fn 2. (Washington consumers have signed a common set of principles). At this time, without further discovery, the Alaska petitioners cannot adopt that position. The Alaska petitioners reserve the right to state a position after sufficient discovery becomes available to them.

ARGUMENT

1. The Significant Interest of Alaska Petitioners

At the outset, it should be noted that, despite Premera's unsupported assertions to the contrary, Opposition at 14-23, the Alaska petitioners' interests are significant and greater than that of the general public. At least half of the Alaska petitioners are insured by Premera; one of the Alaska petitioners likely is Premera's largest Alaska customer (i.e., University of Alaska); another is Alaska's largest umbrella group for social service agencies concerned with, amongst other things, health care for Alaskans (i.e., the United Way of Anchorage); another is one of Alaska's largest providers of health care to uninsured and underinsured Alaskans (i.e., the Anchorage Neighborhood Health Center). Therefore, the Alaska petitioners have an obvious significant interest (as the word "significant" is commonly defined, Joint Reply at 6-7), in the proposed conversion.⁵

2. The OIC's Recommendation Poses a Conflict of Interest

a. Allocation of Assets

⁵ The use of the possible conversion proceeds in Alaska is also of great importance to the Alaska petitioners. Alaska has needs and issues that are unique to it as a state, which require separate consideration of the proper structure of any proposed foundation shareholder and Alaska charitable organization. For example, Alaska faces severe shortages in several key health professions. Similarly, the issues relating to rural health care in Alaska are fundamentally different than anywhere else in the United States. The Alaska petitioners have an interest in seeing that Alaska's share of the conversion proceeds are distributed towards improving the availability of quality, affordable health care and related services and in addressing the unmet personal and public health care needs under the distinct circumstances faced by Alaskans.

If the proposed conversion is approved, a determination will need to be made as to how Premera's assets will be allocated between Washington and Alaska. The question of how these assets will be allocated between the two states poses an irreconcilable conflict between the interests of the Alaska petitioners and the Washington petitioners, preventing a single "attorney-in-charge" from being able to legally represent both the Washington and Alaska petitioners. *See* Washington Rules of Professional Conduct ("RPC") 1.7 (a) and (b); *see also Eriks v. Denver*, 118 Wn.2d 451, 460 (Washington 1992).

RPC 1.7 (a) provides, in relevant part:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) Each client consents in writing after consultation and a full disclosure of the material facts[.]

RPC 1.7(a) (2002).

Additionally, RPC 1.7 (b) provides, in relevant part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client...unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected [.]

RPC 1.7(b) (2002).

In *Eriks v. Denver*, the Supreme Court of Washington, in considering whether an attorney breached his ethical duties by representing multiple clients in the face of a conflict, stated:

The Ethical Considerations to the CPR make it clear the rules disfavor multiple representation anytime there is even a potential conflict of interest. CPR DR 5-105 applies not only when there is an actual conflict, but when the various clients' interest 'may' be merely 'inconsistent, diverse, or otherwise discordant.'

Eriks, at 460 (citations omitted). Here, how Premera's assets will be distributed between Alaska and Washington, should the conversion occur, poses too great a conflict for one attorney to reasonably believe, within the bounds of her ethical obligations, that she could fairly, reasonably, and zealously represent both sets of petitioners as to that issue. Thus, ordering all Washington and Alaska consumers to be represented by one counsel is tantamount to ordering a violation of RPC 1.7.

b. Impact on Healthcare in Alaska

Premera is Alaska's largest healthcare insurer. A major change in its organizational structure, such as that presented by the proposed conversion, likely will have a tremendous impact on Alaska's healthcare system.⁶ There may or may not be a similar impact on Washington's healthcare system. Indeed, it is possible that one state's healthcare system will be benefited while another's will be undermined. Should the sole "attorney-in-charge" argue for or against the conversion when faced with such a conundrum? More practically, but equally troubling, is the issues of focus and discovery limitations. Should the sole "attorney-in-charge" focus his or her limited discovery efforts on the potential impact the conversion might have on Alaska or should s/he focus his/her efforts on the potential impact on Washington? Requiring common representation of both Washington and Alaska petitioners by one "attorney-in-charge" raises the very real

⁶ As stated in page 3 of this reply, the Alaska petitioners, many of who are insured through Premera, have an obvious concern regarding the potential impact a transaction of this magnitude poses on the healthcare system of Alaska.

specter that that attorney's duty of loyalty to her Washington clients will run afoul of her duty of loyalty to the Alaska clients.⁷ *See* RPC 1.7(a) and (b).

4. The Washington Proceeding is the Only Available Forum

Premera has taken the position that the OIC's review can and will encompass the impact on the public interest of both Washington and Alaska. *See* Premera's Opposition at 23-25. The OIC has no duty, however, to protect the interests of the Alaskan public. What's more, although the OIC and the Alaska Division of Insurance presumably will work cooperatively on all aspects of the proposed conversion, the Alaska Division of Insurance has not intervened in the Washington proceeding, leaving the Alaska petitioners with no guarantee that their interests will be adequately addressed in this proceeding.

Furthermore, the Alaska Division of Insurance presently has no plan to hold an evidentiary hearing on the proposed conversion. Even if the Division does schedule and hold a hearing, there is no clear statutory mechanism for intervention by interested parties in that proceeding. Accordingly, only through intervention by the Alaska petitioners in the Washington proceeding can their significant interests be guaranteed to be appropriately addressed without the manifest conflicts of interest that exist in the present OIC recommendation.⁸

⁷ Likewise, neither could an attorney representing the interests of Alaska petitioners adequately represent the interests of Washington petitioners on this issue. *See* RPC 1.7 (a) and (b).

⁸ Premera's self-serving claim that granting the petitioners intervenor status will do nothing more than cost time and money, Opposition at 24, is without merit. Premera's basic argument appears to be that participation by the very people who will be affected by this conversion will hinder its ability to rush this deal through. Because the Alaska petitioners have volunteered to join with the Washington consumers group on all

5. Discovery

The Alaska Petitioners appreciate OIC's and Premera's desire for a prompt and orderly conduct of this proceeding and the potential for unmanageable discovery requests. For this reason, the Alaska petitioners agree to participate with the Washington consumers group on discovery and presentation of arguments related to all various common issues.

That being said, the desire for efficiency cannot outweigh the need for meaningful discovery and presentation of evidence on all issues so that the OIC can make an informed decision as to whether the proposed conversion is indeed in the public interest. As the California Supreme Court noted many years ago, "[c]ertainly the interest in preserving the summary nature of an action cannot outweigh the interest of doing substantial justice. To hold the preservation of [a] summary proceeding of paramount importance would be analogous to the 'tail wagging the dog.'" *Schweiger v. Superior Court of Alameda County*, 476 P.2d 97, 101 (Cal. 1970) (citation omitted). The tail should not be allowed to wag the dog in this proceeding of historical import.

common issues, have volunteered to join together as one Alaskan group for the purposes of intervening on Alaskan issues, and have further volunteered to limit their rights to discovery, the petitioners' presence will not unduly burden the proceeding or prejudice Premera's interests in a speedy process.

The Alaska petitioners therefore request discovery rights on the distinctly Alaskan issues, namely: 1) allocation of the assets between Washington and Alaska;⁹ and 2) impact of the proposed conversion on the healthcare system in Alaska.

CONCLUSION

For the foregoing reasons, the Alaska petitioners respectfully request that they be permitted to intervene separately on the issues of allocation of conversion assets and the impact on the healthcare system in Alaska.

DATED this 19th day of December, 2002.


Respectfully submitted by:

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⁹ This includes, inter alia, valuation issues and proposed governance and structure of the proposed foundation shareholder and Alaska charitable organization.

APPROVED:



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